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STATE OF CALIFORNIA  
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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INQUIRY CONCERNING  
FORMER JUDGE STEVEN C. BAILEY,  
CJP NO. 202

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CERTIFIED TRANSCRIPT

REPORTER'S TRANSCRIPT OF  
ORAL ARGUMENTS BEFORE COMMISSION  
SAN FRANCISCO, CALIFORNIA

Wednesday, January 30, 2019

REPORTED BY: CHARLOTTE A. MATHIAS, CSR 9792, RPR

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23 Honorable Steven C. Bailey

24 Superior Court of California

25 County of El Dorado

1 EXAMINERS:

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1 WEDNESDAY, JANUARY 30, 2019 1:34 P.M.

2 THE BAILIFF: All rise. The appearance before  
3 the Commission on Judicial Performance in the matter of  
4 inquiry number 202 concerning former Judge Steven C.  
5 Bailey is now in session. Please be seated.

6 COMMISSIONER NISHIMURA: Good afternoon, ladies  
7 and gentlemen. These are the public proceedings of  
8 inquiry concerning former Judge Steve C. Bailey. I'm  
9 Nanci Nishimura, Chairperson of the Commission.

10 All Commission members are present. Any member  
11 of the Commission may ask questions or otherwise  
12 participate during these proceedings. Respondent Judge  
13 Steven C. Bailey, formerly of the El Dorado County  
14 Superior Court, is present with his counsel, James A.  
15 Murphy and Janet L. Everson of San Francisco.

16 The examiners for the Commission are trial  
17 counsel, Mark A. Lizarraga and assistant trial counsels,  
18 Sei Shimoguchi and Bradford Battson.

19 This is the time and place for the oral  
20 argument pursuant to Commission Rule 132. Once the  
21 argument is concluded and the matter is submitted, the  
22 Commission will meet in closed session to deliberate.

23 The Commission's decision will be in writing  
24 and it will be served on the parties and will be made  
25 public.

1 Pursuant to Rule 136 of the Commission rules,  
2 our decision will become final 30 days after it is  
3 issued. The respondent has the right to petition the  
4 California Supreme Court for review of the Commission's  
5 determination.

6 For the benefit of counsel for both sides and  
7 Judge Bailey, the members of the Commission have  
8 received the transcript of the evidentiary before the  
9 Special Masters, as well as the report of the Special  
10 Masters and the parties' briefs. In making your  
11 arguments, please assume each Commissioner is familiar  
12 with the record and the issues presented by the briefs.

13 We have scheduled one hour for oral argument.  
14 Each side is allotted 30 minutes. Judge Bailey is  
15 welcome to address the Commission as part of his  
16 30-minute presentation. The examiner will be heard  
17 first.

18 Mr. Lizarraga you may proceed. Also, please  
19 advise if you would like to reserve any time of your 30  
20 minutes for rebuttal.

21 MR. LIZARRAGA: Good afternoon. Once again, my  
22 name is Mark Lizarraga. I'm the examiner in this case.  
23 Madam Chairperson, I would like to reserve 10 minutes.  
24 May I proceed?

25 COMMISSIONER NISHIMURA: Yes.

1 MR. LIZARRAGA: The examiners in this case  
2 requested several additional fact-findings and canon  
3 violations. Our requests are essentially uncontested  
4 with the exception of Count B, Count 2B, Count 2C, and  
5 Count 4B.

6 So with regards to our request for additional  
7 fact-findings and canon violations, since they're  
8 essentially uncontested, I'm going to submit them on the  
9 briefs unless you all have questions for me, of course.

10 The examiners also made several objections to  
11 the masters' findings. I cannot go into every single  
12 one of those objections. I would like to highlight a  
13 few things with regards to Count 3, Count 9 and the  
14 aggravating factor, but I would first like to begin with  
15 discipline.

16 So it is clear, the examiner is requesting that  
17 Judge Bailey be censured and barred. As this Commission  
18 knows, it has identified several factors that are  
19 relevant to determining an appropriate sanction. The  
20 extent of misconduct, prior discipline, demonstrated  
21 appreciation of his conduct, likelihood of future  
22 misconduct, impact of misconduct on the judicial system.

23 Again, I'm allotted 30 minutes. I can't go  
24 into every single one of those, but I would like to  
25 highlight a few of those. I would like to start off the

1 factor of the appreciation.

2           If you look at Judge Bailey's responses to the  
3 Commission, his answer, his briefs to the Masters, he  
4 clearly has failed to recognize the impropriety of his  
5 acts. He has offered two defense theories. One of  
6 them -- or the initial one was the essentially the --  
7 the Commission members or the Commission's out to get  
8 him. He has indicated that the case is politically  
9 motivated. And he hasn't just said this in private. He  
10 said it publicly. And his -- his accusation is  
11 equivalent to saying that the charges lack merit and  
12 that the body bringing these charges, because they're  
13 bringing them for political reasons, is basically  
14 dishonest.

15           And like I said, he didn't just say this in  
16 private. He went out in public and he amplified it by  
17 repeating it several times. And so I would like to play  
18 an excerpt of one of Judge Bailey's, you know, false  
19 accusations against the Commission. And this was from a  
20 radio show. It's -- the entire interview is in  
21 evidence. The transcript is also in evidence. So I'm  
22 going to play an excerpt, because I only have 30  
23 minutes.

24           So I'm going to start at -- the first segment  
25 is going to start at 2 hours, 6 minutes, and 26 seconds

1 and it's going to go to 2 hours, 8 minutes, 44 seconds.

2 And this is Exhibit 21, the audio. The transcript is  
3 Exhibit 22.

4 (Playing of audio file.)

5 MR. LIZARRAGA: And then the next excerpt is  
6 going to be from 2 hours, 10 minutes, 5 seconds to  
7 2 hours, 11 minutes, and 52 seconds. And again, that is  
8 Exhibit 21, that's the audio, and the transcript is  
9 Exhibit 22.

10 (Playing of audio file.)

11 MR. LIZARRAGA: So that was his initial defense  
12 theory to sort of explain his predicament. He continued  
13 with that in his submissions in this case. And then he  
14 eventually started to abandoned it and adopted a new  
15 theory.

16 And that new theory was that Judge Kingsbury  
17 was the cause of his problems. According to Judge  
18 Bailey, Judge Kingsbury felt threatened by him, that he  
19 inquired about how long she had been presiding judge out  
20 in El Dorado Superior Court. And because she felt  
21 threaten and had wanted to cling to this presiding judge  
22 title, she decided to essentially staff her minions  
23 throughout the courthouse to uncover things on Judge  
24 Bailey.

25 COMMISSIONER NISHIMURA: Excuse me, sir.



1 Mr. Anthony Capozzi has a question for you.

2 COMMISSIONER CAPOZZI: I have a question,  
3 Mr. Lizarraga. How do you account for the charges in  
4 this case being filed two days before his candidacy was  
5 filed? Was that planned that way, or how did it happen?

6 MR. LIZARRAGA: It was just filed. As you  
7 know, the investigation was a prolonged investigation.  
8 And the charges get filed when the notice gets approved.  
9 And there's no nefarious conduct. I realize he's trying  
10 to draw an inference from that.

11 COMMISSIONER CAPOZZI: But it was filed two  
12 days before his candidacy. There was no intent knowing  
13 that was going to happen two days later?

14 MR. LIZARRAGA: No, Your Honor. I mean -- I  
15 mean -- that accusation to me is equivalent to saying  
16 the charges lack merit. And clearly the charges do not  
17 lack merit, because the Special Masters sustained 10 of  
18 11 counts.

19 COMMISSIONER CAPOZZI: Do you consider the fact  
20 that he retired in August 31st, 2017, and he doesn't  
21 file his candidacy until February 26th, '18? Are you  
22 saying his conduct during that period of time after he  
23 retired?

24 MR. LIZARRAGA: No, no, no. We are alleging  
25 misconduct through the time he's on the bench. I mean,

1 we were -- go ahead. I'm sorry.

2 COMMISSIONER CAPOZZI: The other question I  
3 have is you said his new theory is blaming Kingsbury.

4 MR. LIZARRAGA: Right.

5 COMMISSIONER CAPOZZI: In the Masters' report,  
6 they were pretty clear there was animosity between the  
7 two.

8 MR. LIZARRAGA: They indicate there was a toxic  
9 environment. But the toxic environment is not a  
10 mitigating factor. If you think about it, did the toxic  
11 environment cause any of the conduct here? I mean, did  
12 it cause him to make stereotyping remarks or cause him  
13 to accept gifts he wasn't supposed to accept or cause  
14 him to use his title and campaign throughout the state  
15 for office?

16 COMMISSIONER CAPOZZI: Are you disagreeing with  
17 the Masters' findings in the first 6 counts?

18 MR. LIZARRAGA: We -- we -- yes. We would --  
19 with some of the findings. We are asking for additional  
20 fact-findings. For example, in Count 2, Count 2B,  
21 Count 2C, they made no findings. So do you want me to  
22 list --

23 COMMISSIONER CAPOZZI: It's a conduct question.

24 MR. LIZARRAGA: There's various objections, and  
25 most of those go to the level of misconduct that the

1 Masters found. They found a number of improper action,  
2 and we believe that those actually rise to the level of  
3 appreciation of misconduct.

4 COMMISSIONER CAPOZZI: All right. Thank you.

5 MR. LIZARRAGA: So what those two theories  
6 demonstrate is that Judge Bailey essentially has no  
7 self-awareness. He does not recognize his misconduct in  
8 this case.

9 And it's not just limited to those theories. I  
10 don't have, you know, the time to go through every  
11 single one of the counts. But you'll notice in Judge  
12 Bailey's responses to the Commission, he's saying he  
13 disagrees. He says, no, that's not correct. I  
14 appreciate my -- I appreciate my misdeeds. I understand  
15 what I did wrong.

16 But if you -- if you really closely examine his  
17 writings, he really does not have any appreciation for  
18 the improprieties of his acts. And I'm just going to  
19 list a couple.

20 For example, in Count 6. If you recall,  
21 Count 6 was the gay tailor remark. So the Masters found  
22 that he made a remark -- stereotyping remarks about gay  
23 men. And they didn't give a lot of detail, but they  
24 made that particular conclusion.

25 Now, this particular exhibit is in evidence.

1 It's Exhibit 236. And it's an email that was drafted by  
2 Suzanne Thurman who was one of the individuals that  
3 heard the gay tailor remark. And she drafted it when  
4 the facts were fresh in her mind, the same day she heard  
5 the comment.

6 So this is what she says, and I'm just reading  
7 an excerpts of it. You can take a look at Exhibit 236.  
8 She's saying this is what Judge Bailey said. I got --  
9 he's referring to his clothes. Somebody made a comment,  
10 oh, you're very well together -- put together today or  
11 your clothes look a little bit odd. And this is his  
12 response.

13 "I got it in Paris or somewhere from a  
14 gay guy, so I know it's a nice shirt, as the  
15 gays only have nice clothes. And I know it  
16 goes together with what I'm wearing, because he  
17 picked it out, the whole thing, and gays really  
18 know how to dress."

19 So that's his -- that's his remark. Again, the  
20 Masters made a finding. Judge Bailey is saying, I fully  
21 appreciate, I'm fully aware of my misconduct. But take  
22 a look at what I said, take a look at his submissions  
23 prior to this hearing and if you look at his proposed  
24 findings of facts to the Masters.

25 So what happens is there is a hearing, and

1 after the hearing both sides, propose what they think  
 2 the findings of fact should be. This is Judge Bailey's  
 3 proposed findings of fact and conclusions of law.  
 4 Page 6 -- I'm sorry. This is Count 6, page 81. And I'm  
 5 just reading excerpts of it. If you want to take a look  
 6 at it, it's the proposed findings of facts, page 81.

7 The statement was not about all gay men. And  
 8 there's a typo here. There are no factual basis to  
 9 claim that Judge Bailey made any stereotype statement.  
 10 Judge Bailey does not admit to making a remark that  
 11 perpetuates stereotypes. Well, you just heard me read  
 12 that exhibit. Clearly it's -- it's stereotyping  
 13 remarks. Clearly it's about gay men.

14 But even as of his proposed findings of fact,  
 15 he's saying it didn't happen. I didn't do it.

16 COMMISSIONER NISHIMURA: Five minutes.

17 MR. LIZARRAGA: Five minutes. Wow.

18 COMMISSIONER NISHIMURA: Yes, sir. There's a  
 19 question from Mr. Richard Simpson.

20 COMMISSIONER SIMPSON: I guess what I want to  
 21 understand is what weight are you suggesting be given to  
 22 Mr. Bailey's assertion that this is sort of a political  
 23 exercise? I'm not sure what you're saying -- suggesting  
 24 how we ought to consider that. Are you suggesting --  
 25 for example, in the Masters' findings, they didn't find

1 willful misconduct on any of the counts.

2 And so are you suggesting that we ought to  
3 impose a higher level of discipline than we might  
4 otherwise without finding willful misconduct because he  
5 asserts this is a political exercise? I mean, I'm  
6 trying to understand why you're sharing and giving that  
7 such weight in your argument.

8 MR. LIZARRAGA: Okay. First, you don't need a  
9 finding of willful misconduct to censure a judge.

10 COMMISSIONER SIMPSON: I understand.

11 MR. LIZARRAGA: I indicated there are certain  
12 factors in Commission case law that the Commission has  
13 said we look at when we want to make a determination  
14 what's an appropriate sanction. So one of those factors  
15 is whether the judge demonstrates an acceptance of  
16 responsibility, whether he admits the misconduct or  
17 shows he understands what he did wrong. And so that is  
18 one factor for you to consider. And so I play that, and  
19 obviously I'm not going to have time to go through all  
20 of his other denials here. It's all in the paper.

21 But that is a demonstration that he is  
22 unwilling to acknowledge the impropriety and that it's  
23 not his fault. He's always looking for a scapegoat.  
24 It's either the Commission, it's Judge Kingsbury, or  
25 it's just like I said. I'm obviously not going to have

1 time to go through it. He just continuously denies that  
2 he committed all these different allegations. And the  
3 Masters have already sustained 10 out of 11.

4 MR. LIZARRAGA: Am I at ten minutes?

5 COMMISSIONER NISHIMURA: You have 2 minutes.

6 MR. LIZARRAGA: Two minutes. I'm going to have  
7 to rely on the briefing. Another factor for you to  
8 consider is the extent of this misconduct. I've already  
9 indicated the Masters sustained 10 out of 11 charges.  
10 Several of the counts have multiple subparts.

11 For example, Count 9 had 25 subparts. And we  
12 are asking that you make findings as to each one of  
13 those just like you did in Judge Kreep. Judge Kreep,  
14 like here, had 11 charges, 8 were sustained, yet the  
15 Commission in its decision and order found he committed  
16 29 acts of misconduct. How did you get to 29 out of 8  
17 charges? Because they were multiple subparts just like  
18 here.

19 Now, we had a notice with 60 charges, but for  
20 organizational purposes, we just grouped similar conduct  
21 under one count. That doesn't mean he gets to benefit  
22 and say, well, it's all under one count. Therefore, it  
23 should just be one act of misconduct.

24 Also, these multiple acts that he committed  
25 were over an eight-year period. Unlike Judge Kreep

1 where some of the Commission members, if you recall that  
2 questions was for me, that this was just conduct. It  
3 was pre-bench conduct. It was in his first year. What  
4 has he done lately?

5 Well, here you have a broad sort of picture of  
6 who Judge Bailey is on the bench. You have eight and a  
7 half years. Every year, he engaged in some kind of  
8 misconduct. And unlike Judge Kreep, he kind of started  
9 out high and his misconduct started trailing off. Not a  
10 whole lot, but a little bit, it started trailing off.

11 Judge Bailey's misconduct graph is the  
12 opposite. He's consistent and then towards the end of  
13 tenure on the bench, it ramps up. He's engaged in his  
14 most serious misconduct, most egregious misconduct at  
15 the end of tenure when you think he would be getting it.  
16 He would be learning and he would improving his conduct,  
17 but he absolutely was not.

18 COMMISSIONER NISHIMURA: Mr. Lizarraga, it's  
19 time.

20 MR. LIZARRAGA: Thank you, Your Honor.

21 MR. MURPHY: Madam Chair, Judge Bailey will  
22 make the initial presentation and I will request 10  
23 minutes.

24 COMMISSIONER NISHIMURA: All right.

25 JUDGE BAILEY: Thank you for the opportunity to



1 be here today to speak to this august body.

2 I have been specifically asked to deal with the  
3 issue of the political nature of the proceedings and I  
4 want to do that. The political nature is really  
5 multiple-fold. Back -- as far back as 2012, the record  
6 is clear that there was significant hostility on our  
7 bench. Judges were being challenged in contested  
8 elections. The presiding judge and myself were on  
9 opposite sides of those elections. They were quite  
10 expensive for El Dorado County standards, running almost  
11 half a million dollars apiece. And not just expensive,  
12 but they were nasty and bitter.

13 And the initial sets of charges of the  
14 Commission began after those elections. In 2014, there  
15 were significant, mean and nasty elections. The  
16 presiding judge on one side, myself on the other. In  
17 2016, there was a challenge against another sitting  
18 judge in the county. I opposed that sitting judge and  
19 the presiding judge supported him.

20 This -- the record is absolutely clear that  
21 Suzanne Kingsbury used her position and the staff and  
22 resources of the court to exact political retribution in  
23 that case.

24 But I think the real issue of politics is --  
25 there's no mystery. I ran for California Attorney

1 General in 2018. I was one of two voter-nominated  
2 candidates for Attorney General. I happen to be a  
3 Republican. There happened to be a Democrat whose  
4 preference or preferences were to the individual party.  
5 But we're not nominated by our political parties we may  
6 be registered with. We are nominated by the voters of  
7 California.

8           And prior to ever getting into that process, I  
9 reviewed the Constitution of the State of California. I  
10 looked at the case law that had been decided both on the  
11 state and federal level. I looked at California's  
12 process for running for nonjudicial and judicial office.  
13 I reviewed the Chief Justice's video on judicial  
14 fund-raising.

15           I came to the conclusion that the proper  
16 process for running for nonjudicial office, looking  
17 specifically at Article 6, Section 17, that makes it  
18 permissive at or before the time that a declaration of  
19 candidacy, a very specific document, is filed, a judge  
20 may request and it's a permissive statute because the  
21 judge doesn't have to request that.

22           But it gives you certain additional rights in  
23 terms of communicating with voters that you wouldn't  
24 have if you remained an active sitting judge running for  
25 a nonjudicial office.

1           The reason I bring these up is not to say that  
2 the decisions you're going to make today are whether you  
3 are going to say Judge Bailey did this or Judge Bailey  
4 did that, but the decisions on the First Amendment  
5 decisions that you're dealing with in this particular  
6 case. I think it is a case of first impression. The  
7 best I can tell, I'm the first sitting judge in the  
8 history of California, at least in the last probably 70  
9 years -- I didn't go back further than 1950. But we  
10 never had a judge that actually files and runs for state  
11 office, statewide Constitutional office.

12           Before I made the final decision that I ought  
13 to do it, I did talk to people, just as the record  
14 reflects. I talked to people in Los Angeles County and  
15 San Diego and Orange. There was no mystery about the  
16 discussions that took place. Most of the discussions  
17 were in a private nature, going to somebody's office on  
18 my free time sitting down and talking to them to  
19 determine in advance whether there would be a  
20 possibility of running for the office and a probability  
21 that I could get elected to that office.

22           But having looked at the process, I realized  
23 that you can't do any of this first without having a  
24 certain amount of support. And secondly, without being  
25 in a position to raise money. As the Chief Justice says

1 in her video, judges are not prohibited from raising  
2 money.

3           So judges are, however, mandated to follow the  
4 law. And the law in California requires that prior to  
5 being able to raise money, you need to form a committee.  
6 You need either a judicial side or on the nonjudicial  
7 side, you got to follow the same requirements. You need  
8 to get a treasurer. You need to file the statement of  
9 intention. That doesn't make you a candidate. That  
10 simply authorizes you under the Fair Political Practices  
11 Act and California's Elections Code to go out and be  
12 able to file.

13           COMMISSIONER NISHIMURA: Judge Yew has a  
14 question.

15           JUDGE BAILEY: Sure.

16           COMMISSIONER YEW: I'm sorry to interrupt. I'm  
17 taking us back to what you talked about earlier. I  
18 understand there are difficult relationships among  
19 colleagues in a court setting or anywhere. And so to  
20 what extent do you think someone else's conduct excuses  
21 our own bad conduct or our own conduct? Because trying  
22 to fit in what you are saying about Judge Kingsbury and,  
23 you know, what the record has shown.

24           JUDGE BAILEY: I'm not suggesting that it  
25 excuses an individual's conduct. I'm trying to describe

1 the nature and the relationship and what was happening  
2 on the El Dorado County bench at the time. And that's  
3 it.

4 COMMISSIONER YEW: Okay. Thank you.

5 JUDGE BAILEY: Thank you. Any other?

6 COMMISSIONER NISHIMURA: Mr. Capozzi?

7 COMMISSIONER CAPOZZI: Why didn't you ask for  
8 another ethical opinion whether or not you could raise  
9 money? You asked for ethics opinion on one of your --  
10 one of the counts here when sitting on the bench. Why  
11 didn't you ask for another ethics opinion?

12 JUDGE BAILEY: Because it appeared clear in  
13 California statute that there was a process that you  
14 went through to be able to actually raise money. When  
15 the Chief Justice says on her video that judges are  
16 permitted to raise money, that seemed -- and the law  
17 doesn't prohibit, just required that you follow a  
18 certain set of steps within California statutes.

19 When you read the canons, Canon 5 doesn't have  
20 a prohibition against raising money by a sitting judge.  
21 So you have -- if you look at the canons and there's no  
22 prohibition, then what would you normally rely on but  
23 the state of the law?

24 Now, that's not to say I didn't also consult  
25 with attorneys that were versed in public campaign law.

1 I did. And, in fact, ultimately hired the firm of Bell,  
2 McAndrews and Hiltachk that does campaign finance law.  
3 I mean, that's their practice.

4 COMMISSIONER CAPOZZI: Thank you.

5 COMMISSIONER DATO: I have a question here.

6 COMMISSIONER NISHIMURA: Justice Dato has a  
7 question.

8 COMMISSIONER DATO: Do I understand that you  
9 would disagree with Rothman's treatise with regard to  
10 the extent of activity a sitting judge can engage in  
11 prior or while still on the bench? Judge Rothman, as I  
12 think you know, talks about private planning activity as  
13 being something that can be done as long as it's done  
14 away from the courthouse.

15 You seem to be articulating a different  
16 position. Am I correct?

17 JUDGE BAILEY: No. I don't think I am  
18 articulating a different position. I didn't campaign  
19 out of the courthouse. I took time off. When I went to  
20 Southern California to talk to people, I was on my  
21 vacation time or I was on a weekend. I literally went  
22 as far away from my own courthouse as possible to ensure  
23 that I wouldn't have people who would come in front of  
24 me.

25 You know, El Dorado County, South Lake Tahoe,

1 El Dorado County doesn't get a lot of contact with  
2 people in Orange County or San Diego or Riverside.

3 COMMISSIONER DATO: Okay. But am I correct  
4 that you were raising money?

5 JUDGE BAILEY: Absolutely. That's public  
6 record.

7 COMMISSIONER DATO: And you believe that  
8 soliciting contributions and raising money falls within  
9 the private planning?

10 JUDGE BAILEY: I think it falls within the  
11 ambience of California's statutory scheme for campaigns.

12 COMMISSIONER DATO: Okay. You don't see any  
13 ethical issues that that raises?

14 JUDGE BAILEY: No. Not unless -- I don't see an  
15 ethical issue directly unless it's someone who would  
16 have a reason to come before the court, particularly  
17 when the statutory scheme that applies to sitting judges  
18 says you can go raise money.

19 COMMISSIONER DATO: Okay. And you realize that  
20 at least people on your behalf were indicating that  
21 you -- naming you with your title indicating you were a  
22 candidate for Attorney General for 2018? And you don't  
23 view that as going beyond private planning.

24 JUDGE BAILEY: I don't. Because it's a  
25 third-party activity, and they have a political -- First

1 Amendment political right to do that.

2 COMMISSIONER DATO: Okay.

3 JUDGE BAILEY: Respectfully, I understand that  
4 there can be some disagreement. But the fact of the  
5 matter is, I think the statute is controlling and the  
6 statute lays out a statutory scheme that we in  
7 California have adopted, the California legislature's  
8 adopted, and they didn't put restrictions in the law  
9 that singles judges out.

10 COMMISSIONER DATO: But now it's correct -- am  
11 I correct? My understanding of the record is that with  
12 respect to your campaign committee and other people who  
13 were working on your behalf, you didn't take any steps  
14 to tell them not to use your title?

15 JUDGE BAILEY: I did not.

16 COMMISSIONER DATO: Okay.

17 COMMISSIONER NISHIMURA: I have a question.  
18 Isn't it true in November 2016, you sought the advice of  
19 Former Judge Julie Conger, who was an expert on judicial  
20 ethics and she advised you that you should not  
21 distribute flyers including a photograph of you in your  
22 robe? And she urged you to remove your judicial title  
23 from emails relating to your campaign, to avoid using  
24 the title in your campaign literature until after you  
25 took leave; is that correct?



1 JUDGE BAILEY: No. What I asked her is whether  
2 I could have -- whether a flyer with me in my judicial  
3 robe was proper. She told me no. And we didn't  
4 distribute it. We destroyed that.

5 COMMISSIONER NISHIMURA: She also advised you  
6 that you should take leave from the bench; is that  
7 correct?

8 JUDGE BAILEY: No.

9 COMMISSIONER NISHIMURA: And you didn't do  
10 that. This is November 2016. You filed your intention  
11 in April of 2017; correct?

12 JUDGE BAILEY: We filed a notice of intention  
13 in April of 2017.

14 COMMISSIONER NISHIMURA: There's a question for  
15 Mr. Richard Simpson.

16 COMMISSIONER SIMPSON: The context of the  
17 comments that you have made are that the  
18 campaign-related activities prior to your resigning from  
19 the bench, in your view, aren't considered misconduct in  
20 the first place?

21 JUDGE BAILEY: That's correct. I think that's  
22 correct.

23 COMMISSIONER SIMPSON: I want to make sure I  
24 got the bottom line.

25 JUDGE BAILEY: Sure.

1 COMMISSIONER SIMPSON: I understand you. Thank  
2 you.

3 JUDGE BAILEY: I think that's an important  
4 point. And I understand, you know, how distant I am  
5 from where the examiner is. The reason -- and even the  
6 Masters. But the reason that's very important is, you  
7 know, it isn't reasonable to expect that you can go to  
8 the date that the Constitution requires or gives you  
9 permission to take a leave of absence and assume that on  
10 that particular day, all of a sudden you take a leave  
11 the absence and begin to run for public office.

12 Now, you can say -- you can look back and say,  
13 oh, Judge Bailey should have -- you know, that should  
14 have just jumped right out at him. I suggest to you  
15 that a decision that you make is going to impact every  
16 judge forward that may wish to run for, say, district  
17 attorney, Bonnie Dumanis, for example, or Rackauckas, or  
18 Zellerbach, or any of the other people who have been  
19 sitting judges at the time they run.

20 It's not realistic to assume that they waited  
21 until the day they can file without talking to anyone,  
22 without going out and trying to find out whether they  
23 would have support. I didn't do that either. I looked  
24 to people. I talked to people. I suggested to people  
25 that I was thinking and/or others suggested I was going

1 to run. I admit that.

2 But I think it's permitted under the California  
3 statutory scheme. And I don't think it's prohibited  
4 under the way the canons were written.

5 COMMISSIONER SIMPSON: Thank you.

6 COMMISSIONER NISHIMURA: Judge Michael Harper  
7 has a question.

8 COMMISSIONER HARPER: I'm just curious on the  
9 Attorney Clark issue.

10 JUDGE BAILEY: Sure.

11 COMMISSIONER HARPER: You were clearly friends  
12 with Mr. Clark. And you initiated at his wedding, went  
13 golfing.

14 When you appointed him as a special master, why  
15 did you feel you didn't need to disclose that  
16 relationship?

17 JUDGE BAILEY: Because it was an informal  
18 relationship. I was the bar president for roughly --  
19 well, about two years.

20 COMMISSIONER HARPER: An informal relationship  
21 with your friendship with him or the appointment?

22 JUDGE BAILEY: No. I knew him. I knew all the  
23 attorneys in El Dorado County.

24 COMMISSIONER HARPER: Don't judges have an  
25 ethical obligation to disclose that when you're

1 appointing an attorney on a case at \$350 an hour? Why  
2 didn't you feel you needed to disclose that? I  
3 understand you thought you didn't need to. But do you  
4 think you still had an obligation to disclose that  
5 friendship?

6 JUDGE BAILEY: I don't know. At this point,  
7 you know, that probably would have been the safe way to  
8 do it. But at the time, it -- because I knew every  
9 lawyer, having dealt with all of those lawyers. I was  
10 in South Lake Tahoe. What I was looking for in the  
11 Clark matter, because the nature of the litigation and  
12 how the attorneys were, one, taking up significant court  
13 time over issues that were difficult to ferret out what  
14 the actual dispute was. That's why we appointed Clark.

15 Now, he was on a list of discovery referees, as  
16 was Dave Bellick, and a number of other lawyers from the  
17 Placerville area. We have some lawyers outside of South  
18 Lake Tahoe who were also on our discovery referee list.

19 But in my opinion, the lawyers in South Lake  
20 Tahoe had become corrupted because there was too much  
21 discussion over this particular issue in South Lake  
22 Tahoe. So it was advisable to go find a lawyer outside  
23 of Tahoe. Clark was one. He -- obviously, I knew who  
24 he was. I knew Dave Bellick and I knew the other  
25 lawyers on the list in Placerville. We had practiced

1 together. We knew each other.

2 But just knowing him didn't to me rise to that  
3 level. That particular individual, you know, being at a  
4 point where I thought it was -- you know, the  
5 relationship was too close and would require disclosure  
6 at that time.

7 COMMISSIONER NISHIMURA: Two minutes, Your  
8 Honor.

9 COMMISSIONER HARPER: Thank you.

10 JUDGE BAILEY: I'm done.

11 COMMISSIONER NISHIMURA: I have one question  
12 for you. In your opening remarks, you characterize this  
13 as political in nature and this is in retaliation. And  
14 you named the judges who you thought were out to get  
15 you. But you also referred to the purported political  
16 makeup of this Commission, although you characterized it  
17 as this august body. Are you suggesting that the  
18 Commission is out to retaliate against you for political  
19 reasons?

20 JUDGE BAILEY: I'm not suggesting that. But  
21 in, you know, the height of a political campaign, when  
22 the Commission staff, when you guys, you know, get  
23 the -- get to take the heat, I guess, for actions of the  
24 Commission staff two days before filing, they file an  
25 accusation based on conduct that was at that point over

1 six months old, if it even is occurring, nothing --  
 2 there was almost no action other than letters from the  
 3 Commission staff up until I announced I was going to  
 4 retire. And then all of a sudden, it went into  
 5 hyperspeed.

6 And I retired at the end of August, immediately  
 7 announced I was going to run for Attorney General in  
 8 early September. And then roughly -- not quite six  
 9 months, but almost six months later, they file the  
 10 accusation. Again, two days before I'm going to file.

11 How do you perceive it? Do you think it sounds  
 12 political?

13 COMMISSIONER NISHIMURA: I'm asking you the  
 14 question.

15 JUDGE BAILEY: Yeah. I think it sounds very  
 16 political.

17 COMMISSIONER NISHIMURA: Thank you for your  
 18 time. Oh. Ms. Pattyl has a quick question.

19 COMMISSIONER KASPARIAN: Of the 11 counts of  
 20 alleged misconduct, which one are you the most surprised  
 21 with and which one of the positions most disappoints  
 22 you?

23 JUDGE BAILEY: Frankly, I don't know that I'm  
 24 surprised or disappointed with any of the counts that  
 25 were brought. The facts are what the facts are. What

1 I'm most concerned, I will tell you, is any findings  
2 that you ultimately decide to make on the issue of  
3 judges running for nonjudicial office, I think it really  
4 needs to be considered.

5           You know, frankly, I would encourage you to be  
6 absolutely narrow in any finding you make, because if  
7 you're not narrow, you will impact any other judge,  
8 good, bad, indifferent, people you support, don't  
9 support, you know think out to run in the first place.  
10 But -- there is a -- you know, it's a Mack truck waiting  
11 to go through that opening.

12           And I think from my perspective, I looked at  
13 our United States Supreme Court decisions, as I  
14 mentioned, I also looked at the California case law, and  
15 I looked at the California statutory scheme, compared it  
16 to the canons, and I believe that I was on solid legal  
17 ground when I made the decision to run for California  
18 Attorney General and in the manner that I did run for  
19 California Attorney General.

20           COMMISSIONER NISHIMURA: Thank you.  
21 Mr. Murphy, you can relinquish some time for further  
22 questions to Mr. Bailey, or you have eight minutes.

23           MR. MURPHY: There are a few points I would  
24 like to make.

25           First of all, I listened to Mr. Lizarraga and

1 I'm sure he's not trying to mislead the Commission, but  
2 he played this transcript of the Phil Cowan interview of  
3 Judge Bailey. And he gave it a broad brush approach,  
4 this is how Judge Bailey viewed the Commission. Well,  
5 the question was relating to CHI and how he perceived  
6 CHI and the allegations of the Commission that he was  
7 personally profiting by the referrals of this SCRAM  
8 devices to CHI. That's what this transcript is about.

9           Mr. Cowan says misusing his position on the  
10 bench for personal profit. And then Judge Bailey talks  
11 about CHI and how he obtained an ethics opinion before  
12 he even referred any matters to CHI. So we're not  
13 talking about this theory that somehow everything the  
14 Commission has done was politically motivated. Which  
15 raises the next issue, which is what Madam Chair said  
16 about the perception.

17           Well, if you look at CCP Section 170.1, when a  
18 judge is disqualified as an objective person knowing the  
19 facts would include a judge not be fair and impartial.  
20 It's a perception issue. It's an optic issue as my  
21 children say. And that's the problem here. It is a  
22 perception issue. And he's being criticized for raising  
23 that issue.

24           The other point I wanted to make is that in  
25 connection with these activities in campaigning for



1 political office. That was never from anyone. Judge  
2 Bailey was exploring a campaign for Attorney General and  
3 engaging campaign activities as the Special Masters  
4 found back in 2017. But the question here is not  
5 whether he was campaigning or engaging in exploratory  
6 campaign. The question under Canon 5 is personally  
7 prohibiting personally soliciting funds for the  
8 political organization or nonjudicial candidate or  
9 making speeches for a nonjudicial candidate.

10           What's a candidate? It's not defined in the  
11 canons. Candidate for judicial office is, but a  
12 candidate is not. And what Judge Bailey did before he  
13 decided to run for attorney general was within the  
14 Constitution. He researched the law, looked at the  
15 canons, review the Elections Code, and he correctly  
16 determined that a person becomes a candidate when they  
17 file a declaration of candidacy, which he did in 2018  
18 after he had retired from the bench.

19           And I submit this canon at best is ambiguous.  
20 But if we read it literally, he was not a candidate for  
21 nonjudicial office until 2018. A couple of additional  
22 points --

23           COMMISSIONER DATO: I have a question on that.

24           MR. MURPHY: Certainly.

25           COMMISSIONER DATO: This goes to the question I

1 asked of Judge Bailey. He said he did not disagree with  
2 Judge Rothman with regard to that dividing line of what  
3 you can do before you leave the bench and what you can  
4 do after in terms of being a candidate for nonjudicial  
5 office. Yet you seem to be saying as long as you are  
6 not an officially declared candidate, there are no  
7 limitations on your filing. Do I understand you  
8 correctly or not?

9 MR. MURPHY: Well, that's not quite as broad as  
10 I would have put it.

11 I think what Rothman is talking about, and I  
12 don't share his view, there are activities that a judge  
13 could engage in that would violate other canons, but not  
14 Canon 5. And I think in a campaign -- an exploratory  
15 campaign, informing the obligation required of the  
16 Elections Code for the Fair Political Practices Act and  
17 statute establishing campaign and soliciting money, I  
18 don't think those are the types of activities that are  
19 directly addressed by Canon 5. And certainly he did not  
20 violate Canon 2, the exploratory campaign.

21 The question is, was he a candidate? Because  
22 that's what Canon 5 addresses. A candidate for  
23 nonjudicial office.

24 COMMISSIONER DATO: Again, you define that by  
25 reference to filing a candidacy statement; am I correct?

1 MR. MURPHY: Under the Elections Code, that's  
2 when you become a candidate.

3 COMMISSIONER DATO: So under that view, you can  
4 refer to yourself as a candidate. Other people who are  
5 working with you can refer to yourself as a candidate.  
6 You can solicit donations. None of that makes you a  
7 candidate. It's only filing the statement. Is that  
8 what you're saying?

9 MR. MURPHY: That's what I'm saying.

10 COMMISSIONER DATO: Okay.

11 COMMISSIONER NISHIMURA: Mr. Murphy, three  
12 minutes.

13 MR. MURPHY: Thank you. Two quick points.  
14 Mr. Lizarraga said that there is this new theory  
15 involving Judge Kingsbury. Well, I have been  
16 representing Judge Bailey from day one. And the first  
17 theory that we defended the case on was Judge Kingsbury  
18 and Judge Bailey were at odds were one another. There  
19 weren't any issues with respect to political campaign  
20 when the initial preliminary investigation was issued in  
21 this case. So that's not a new theory. That's the  
22 theory we had from the very beginning.

23 It's when Judge Bailey decided to engage in  
24 exploratory campaign and campaign for Attorney General  
25 that the First Amendment and political issues arose.

1 The thing that's most noticeable about Judge Bailey's  
2 activities and what the Special Masters found was that  
3 none of the conduct that they found was a violation of  
4 the rules or canons involving conduct in the courthouse  
5 or his performance of job duties as a judge. He didn't  
6 abuse the judicial power. There's no question about his  
7 fairness and impartiality as a judge. There was no  
8 question regarding his honesty in discharging his  
9 judicial duties and no issue of contempt or abuse or  
10 anything else.

11 If you look at the decisions of the Commission  
12 on censure, all of those involve willful misconduct or  
13 abuse in the courthouse. And we have an absence here.  
14 And I submit that the discipline shouldn't be a censure,  
15 but public admonishment. Thank you.

16 COMMISSIONER NISHIMURA: Mr. Lizarraga?

17 MR. LIZARRAGA: I'm going to have to bounce  
18 around, so forgive me. These are Exhibits 78 and  
19 Exhibit 79, but, you know, I'm going to try to do this  
20 as quickly as possible.

21 But Mr. Murphy said, you know, blaming Judge  
22 Kingsbury has not been a new theory in representing  
23 Mr. -- Judge Bailey for X number of years. Well, just  
24 look at his submissions. Look at his answer. Look at  
25 his responses to the Commission. Look at his briefs to

1 the Special Masters. And then look at his briefing  
2 after the hearing. Clearly this is a new theory.

3 Judge Bailey says that he made the decision  
4 that he became a candidate by looking at the  
5 Constitution, Article 6. We explained this, you know,  
6 in the briefs. Nothing in -- in Article 6 defines  
7 candidate. It talks about when somebody becomes  
8 eligible for election.

9 Mr. Murphy just said that Judge Bailey did not  
10 become a candidate until 2018. Well, if you look at  
11 Counts 7, 9, 10, and 11, between August of 2016 and  
12 August of 2017, Judge Bailey was going up and down the  
13 state telling everyone he was a candidate and he hadn't  
14 filed his declaration of candidacy yet until 2018. And  
15 you can see by these exhibits, he's using his title,  
16 he's saying he's a candidate, and he's asking for money  
17 for his Attorney General campaign.

18 There's no additional conditional language  
19 there. He's not saying I'm thinking about becoming a  
20 candidate. I'm potentially a candidate. This is an  
21 exploratory campaign. He's declaring himself a  
22 candidate 15, 16 months before he ever files his  
23 declaration of candidacy.

24 He says this is an issue of first impression.  
25 I'm not really sure what he means by that. There's a

1 Zellerbach case that's right on point. What I find  
2 interesting in Judge Bailey's opening brief and reply  
3 brief to this Commission, he never mentions Zellerbach.  
4 He just completely ignores the case. The case is right  
5 on point with regards to Canon 2.B(2) using your title  
6 for your personal interest. And it clearly states that  
7 a judge -- when a sitting judge comes back on the bench,  
8 the judge cannot use his or her title to benefit. You  
9 have the facts of the case? Judge Zellerbach was on  
10 leave of absence. He comes back. Uses his title to  
11 retire a nonjudicial office campaign debt.

12           The Commission is very clear. You can't do  
13 that. So when he comes before you and says this is an  
14 issue of first impression, clearly he did not read the  
15 Zellerbach case that came out in 2010, six years before  
16 he went and embarked on this exploratory actual  
17 campaign.

18           He says he spoke to people. Well, he spoke to  
19 Judge Conger, and she clearly told him not to engage in  
20 the conduct he eventually engaged in. He testified -- I  
21 know what his lawyers are saying now. They're making  
22 these legal arguments. But look at his testimony under  
23 oath. He testified over two days. He's not saying the  
24 things he just said before you now. You can look at his  
25 testimony, like I said.

1           Look at page 956. And what he's telling you at  
2 956 is the, quote, research he did is he read Judge  
3 Rothman's handbook extensively. That's his words. And  
4 he says, and I'll try to read this quickly, but I gave  
5 you the page so you can take a look at it. And so I  
6 reviewed that.

7           And, of course, it compares it to the canons.  
8 And so I compared it to the canons. Look at activities  
9 that I was involved in, concluded that in my estimation  
10 after looking at it that the types of things, talking to  
11 people, letting them know I might be interested in  
12 running, and I'm interested in their opinions, and  
13 whether they would be willing to support me. And those  
14 types of things were permitted.

15           So based on his reading of Rothman -- and this  
16 is his testimony under oath at trial. Based on his  
17 reading of Rothman, based on him examining the canons,  
18 he believed he could engage in this conduct.

19           What's interesting is he's very vague about  
20 Rothman. He doesn't say what he read. He doesn't say  
21 what section he read it in. He didn't say what page he  
22 was on. And if you look at Rothman, clearly there's  
23 nothing in Rothman that says that a judge -- a sitting  
24 judge can use his or her title to promote their  
25 political campaign for a partisan office. There's

1 nothing remotely like that.

2           So, you know, when he comes in here and tells  
3 you he did all this research, take a look at his  
4 testimony under oath. I think what he's saying now  
5 before you should be viewed with a high amount of  
6 skepticism.

7           He said -- he sort of touched on this. He said  
8 he was just talking to people. Look at these exhibits  
9 and there are too many to list. But you have all of  
10 them. He's not just talking to people. He is  
11 clearly -- as you can see in these exhibits, he's  
12 requesting monetary donations in his name for his  
13 campaign.

14           He says that he spoke -- or he said that he --  
15 I believe it was that he listened to a video that the  
16 Chief Justice talked about lawyers can raise money. I  
17 think he was kind of vague about that. He's not exactly  
18 saying what he listened to. But I'm quite sure that the  
19 Chief Justice was talking about raising money in a  
20 judicial campaign and not for a nonjudicial partisan  
21 office.

22           He said that there's nothing in the canons that  
23 say you cannot raise money for a nonjudicial office.  
24 Take a look at Canon 5.A(3), what he was charged with,  
25 what the Masters found. It clearly has a personal



1 solicitation prohibition in there, similar to many other  
2 jurisdictions. And it says that a judge or a candidate  
3 cannot personally solicit contributions for a  
4 nonjudicial candidate, which is what he was.

5           He indicated that he never did any of this on  
6 the premises of the courthouse. He was never charged  
7 with necessarily doing the campaigning on the  
8 courthouse. But -- but so it's clear, he is actively  
9 campaigning throughout California while he is a sitting  
10 judge in El Dorado County. Doesn't matter if it was on  
11 his day off or that he took a sick day or annual leave.  
12 He was campaigning while he's a sitting judge and that's  
13 significant.

14           Finally, this is one of the factors that you  
15 are supposed to look at in determining an appropriate  
16 sanction under policy declaration 7.1. Whether the  
17 conduct was done knowingly and intentionally. And  
18 clearly, there's evidence here that Judge Bailey engaged  
19 in this conduct intentionally.

20           Again, he spoke with Judge Conger. Judge  
21 Conger put him on notice that he was not supposed to do  
22 the various things that he did. Yet he completely  
23 rejected her advice and went ahead used his title and  
24 campaigned. In his arguments to this Commission, he  
25 says that he reviewed the canons and understood what

1 they prohibited, but thought they were unconstitutional  
2 as applied to him.

3           Clearly what he's telling you is I knew what  
4 the canon restricted, but I thought it was unfair or  
5 unconstitutional, so I went ahead and did it anyways.  
6 So take a look at Judge Conger's testimony and in his  
7 own language. He is clearly acting knowingly and  
8 intentionally when he's using his title and he's  
9 campaigning.

10           COMMISSIONER NISHIMURA: Mr. Richard Simpson.

11           COMMISSIONER SIMPSON: Mr. Lizarraga, you think  
12 we should make a finding that some of these  
13 campaign-related activity was willful conduct as well as  
14 prejudicial conduct?

15           MR. LIZARRAGA: No. No, I'm not. I agree with  
16 the Special Masters' findings that this conduct rose to  
17 the level of prejudicial misconduct. The only thing I  
18 objected to is -- well, actually, I didn't object to it.  
19 I asked for an additional finding by the Commission  
20 because for organizational purposes, we put the campaign  
21 under Count 9, one count, but there are 25 subparts to  
22 that, and we are asking you to make prejudicial  
23 misconduct findings as to each of those subcounts.  
24 Because for the most part, they're on different days,  
25 they're different locations, they're different

1 activities that he's involved in that he's violating the  
2 canons.

3 COMMISSIONER NISHIMURA: One minute.

4 MR. LIZARRAGA: So he's asking for the benefit  
5 because it's under one count, he should just get one  
6 count of misconduct. You didn't do that in Kreep.  
7 There is no reason to do it here.

8 So if there are no further questions, I'm going  
9 to submit it. Thank you.

10 COMMISSIONER NISHIMURA: We'll take it under  
11 submission.

12 THE BAILIFF: Please remain seated and just  
13 come to order as the Commission members exit the  
14 courtroom.

15 (Whereupon, the proceedings were  
16 adjourned at 2:40 p.m.)  
17  
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25

CERTIFICATE OF REPORTER

I, Charlotte A. Mathias, Certified Shorthand  
Reporter of the State of California, do hereby certify  
the foregoing pages 1 through 43 are a true and accurate  
transcription of my stenographic notes taken in the  
above-entitled matter on:

DATE OF PROCEEDINGS: 1/30/2019

IN WITNESS WHEREOF, I have hereunto set my hand  
this 14th day of February, 2019.



CHARLOTTE A. MATHIAS, CSR 9792, RPR

State of California

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